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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO CLYDE TIDWELL,

Defendant and Appellant.

C058951

(Super. Ct. Nos.
CRF04-4074,
CRF06-5926)

After numerous grants of probation, defendant Francisco Clyde Tidwell's most recent grant of probation was revoked when he failed to complete a two-year drug rehabilitation program ordered by the court. The previously imposed sentence of 10 years eight months in state prison was then ordered executed. Defendant appeals that order. We affirm the judgment.

FACTS AND PROCEEDINGS

In May 2005, defendant pleaded no contest to possessing cocaine base for sale and resisting arrest in Yolo County case No. CRF04-4074 (case No. 4074). In exchange, two remaining

counts were dismissed, along with charges pending in two unrelated cases. It was further agreed that defendant would be sentenced to 10 years in state prison, but imposition of that sentence would be suspended and defendant would be placed on felony probation for three years.

Eight months later, in January 2006, defendant was arraigned in two new cases: Yolo County case Nos. CRF05-7810 (case No. 7810) and CRF05-6897 (case No. 6897). However, the prosecution agreed to dismiss case Nos. 7810 and 6897 and agreed to "honor" the plea agreement previously reached in case No. 4074.

Consistent with that plea, the trial court sentenced defendant to 10 years in state prison in case No. 4074 but suspended execution of the sentence and granted defendant three years of probation. Under the terms of his probation, defendant was ordered to abstain from illegal drug use, submit to searches and drug testing, and not to possess or control dangerous and deadly weapons.

In October 2006, it was alleged that defendant violated the terms of his probation, once again, by failing to abstain from illegal drug use, failing to submit to drug testing, and possessing deadly and dangerous weapons. The court ordered defendant's probation summarily revoked.

The following month, defendant filed a motion to withdraw the plea he entered into in May 2005 in case No. 4074. The prosecutor opposed the motion, noting that charges for possession of "metal knuckles" were currently pending against

defendant in Yolo County case No. CRF06-5926 (case No. 5926). The court denied defendant's motion.

Shortly thereafter, in April 2007, defendant was formally charged with possession of a prohibited weapon in case No. 5926. It was further alleged that defendant had previously served seven prison terms. (Pen. Code, § 667.5, subd. (b).) Defendant pleaded not guilty and denied the enhancement allegations. The trial court subsequently found true the probation violations alleged in case No. 4074 and ordered defendant's probation revoked. Sentencing was ordered to trail the trial in case No. 5926.

A plea bargain was then entered in case No. 5926, pursuant to which defendant pleaded no contest to possessing an illegal weapon. In exchange, the prior prison term allegations were dismissed and defendant was sentenced to three years in state prison, eight months to be served consecutively to the suspended sentence in case No. 4074. The court then suspended execution of sentence in case No. 5926, granted defendant probation, and reinstated defendant's probation in case No. 4074.

This disposition, to which the prosecution objected, was conditioned on defendant completing the Delancey Street Drug Treatment Program in San Francisco, California: "But [defendant], I want to make it as clear as I can, that in deciding to go along with this and give you one more chance on probation, this is literally your last opportunity on probation. If there is any failure, and, frankly, even if that failure is a

technical failure, you will be committed to state prison despite the fact that your own well-being will be in jeopardy.

"It is your obligation and yours alone to complete the Delancey Street Program. You can't blame failure on anyone else. If you don't succeed in that program, then you will be committed to state prison."

Defendant entered the Delancey Street Program on December 3, 2007. On January 25, 2008, defendant's probation officer, Adrian Tgilde, received a fax from the staff at Delancey Street stating that defendant "left the program" without successfully completing it. On January 30, 2008, a "declaration re violation of probation" was filed in case No. 4074 alleging that defendant violated his probation by failing to report a change in his address, and failing to successfully complete the Delancey Street Program. The following day, the trial court summarily revoked defendant's probation and issued a bench warrant for his arrest.

On February 15, 2008, another "declaration for order and order re violation of probation" was filed, this one in case No. 5926. This second declaration alleged that defendant violated his grant of probation in case No. 5926 by failing to successfully complete the Delancey Street Program.

On April 11, 2008, the trial court held a hearing on the alleged probation violations in both cases. Defendant testified on his own behalf, claiming that he left the Delancey Street Program on January 25, 2008, because he was being threatened and harassed, and he feared for his life. Defendant complained that

the program was filled with "criminals," and when he wanted to talk to his probation officer he was told it was not allowed. Then, a fellow participant in the program was found hung, apparently having committed suicide. Defendant testified he was disturbed by a staff member's response to the hanging and complained to the supervisors at Delancey Street, after which, according to defendant, he was "walked out" of the program.

Defendant explained that when he was "walked out" of Delancey Street, he was locked outside in the rain without a phone with which to contact his probation officer, Officer Tgilde. Eventually, he was able to borrow a phone but was unable to get through to Officer Tgilde because it was after hours. According to defendant, he spent the next two days at a church in San Francisco, and it was not until Monday morning, January 28, 2008, that he was finally able to reach Officer Tgilde.

Defendant remembered telling Officer Tgilde that he was trying to get back to Sacramento; that he wanted to go to a different drug program known as "Victory Outreach." Defendant testified that Officer Tgilde said defendant could do that, but a warrant would nevertheless be issued for his arrest at 10:00 that morning; he instructed defendant to call his attorney. The following morning, defendant arrived at Victory Outreach in Sacramento, where he remained until he was taken into custody.

Officer Tgilde had a different recollection of events. According to his testimony, Officer Tgilde only learned defendant left the Delancey Street Program when he received its

fax on January 25, 2008, indicating defendant left Delancey Street without successfully completing the program. Officer Tgilde did not recall speaking to defendant on January 28, 2008, and was unaware that defendant had moved to the Victory Outreach Program until February 4, 2008, when he received a letter from defendant's lawyer informing Officer Tgilde of the move.

At the conclusion of the hearing, the court found defendant had violated his probation. The trial court subsequently ruled as follows: "When I faced the decision last fall about whether to reinstate probation, the information I [had] from the probation department really made a grant of probation impossible. There was no legal reason why I should have granted you probation . . . [and] . . . I would not have taken this last chance and taken heat at the time if you hadn't told me you were committed to Delancey Street.

"Delancey Street was, from my prospective [sic], the only viable option for someone with your history, and so despite your prior record I suspended the ten year, eight month prison sentence.

"If last year you'd said, Judge, I am who I am and I want to go to Victory Outreach, I wouldn't have placed you on probation. I simply--not that Victory Outreach is a bad program, but from my prospective [sic] only the rigidly structured boot camp like program that is offered by Delancey Street was the kind of program that was going to deal with all aspects of your life.

"At this point Delancey Street is not an option. At this point we're back together again and, frankly, when I look objectively at everything that you've said and done I can't justify reinstating probation again.

"So your heartfelt request for reinstatement is denied. The previously suspended prison sentence imposed in each of these two cases[, 10 years eight months in state prison,] is ordered executed." Defendant was then awarded 1,067 days of custody credit and ordered to pay various fines and fees. Defendant appeals.

DISCUSSION

On appeal, defendant contends the trial court abused its discretion by revoking his probation. Specifically, defendant contends "[t]he evidence did not show that [his] probation violations were willful because the circumstances giving rise to them were not within his control."

The trial court has discretion whether to revoke probation for any violation or to impose some lesser sanction, and we set aside its decision only for abuse of discretion causing a miscarriage of justice. (Pen. Code, § 1203.2, subds. (a), (b); *People v. Rodriguez* (1990) 51 Cal.3d 437, 443; *People v. Zaring* (1992) 8 Cal.App.4th 362, 378.) Defendant shows no miscarriage of justice.

Defendant claims he did not leave Delancey Street voluntarily, but was "forced to leave" because his life was in jeopardy. The record does not support defendant's claim.

Defendant complained Delancey Street was filled with criminals and he was being harassed by other participants. He was upset with the way a member of the staff handled the suicide of another participant, and he believed his life was in danger. Thus, it is evident that he wanted to go, whether the staff wanted him to go or not.

In any event, it is also evident from the trial court's ruling that the court did not find credible defendant's claim that his life was in jeopardy or that the staff at Delancey Street forced him to leave. We will not second guess credibility determinations made by the trial court. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Defendant further contends he took "every reasonable step a homeless person with scant personal resources could have taken to notify probation of the involuntary change in his residence." Defendant violated his probation in case Nos. 4074 and 5926 by failing to complete the Delancey Street Program. Accordingly, whether he did everything reasonable to contact his probation officer and inform him of the change in address, the court still acted within its discretion in revoking his probation.

DISPOSITION

The judgment revoking defendant's probation and executing the previously imposed sentence is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.